Filed 3/8/19 P. v. Vazquez CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ARTURO VAZQUEZ, Defendant and Appellant.	G055540 (Super. Ct. No. 15WF0154) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. Affirmed.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Robin Urbanski, Sabrina Y. Lane-Erwin and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Based on his repeated molestation of his sister (N.V.), beginning when she was 10 years old—and more than 10 years his junior—a jury convicted Arturo Vazquez of eight counts of lewd and lascivious conduct against a child under 14 years of age (Pen. Code, § 288, subd. (a); all further undesignated statutory references are to this code). The trial court sentenced Vazquez to 20 years in prison, consisting of the mid-term of six years on count one, and two consecutive years for each of the seven additional lewd act counts. Vazquez raises a host of issues on appeal.

He initially argues his multiple lewd act convictions must be modified to reflect a single conviction for continuing sexual abuse (§ 288.5) because the prosecutor was required to charge him under that statute as more specific to his conduct than individual lewd acts. Next, he contends generic testimony supporting some of the lewd act offenses was legally improper and, in any event, insufficient in the particular circumstances here. Third, he asserts his trial counsel was ineffective for failing to object to the admission of allegedly coerced, involuntary statements he made in a so-called "pretext call" he received from the victim.

Fourth, Vazquez claims the nurse certified in conducting sexual assault examinations testified beyond the scope of her expertise when she opined N.V.'s hymen injuries were "very suspicious of sexual abuse." Fifth, he argues the prosecutor briefly misstated California's modified version of "acquittal first" rule. Vazquez also makes two instructional claims. Sixth, he contends that CALCRIM No. 1110, which defines lewd acts, is improperly argumentative. And finally, he argues that CALCRIM Nos. 362 and 371, consciousness of guilt instructions, led the jury to make irrational permissive

inferences. As we explain, none of Vazquez's contentions warrant reversal of the jury's verdict, and we therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

N.V. lived with her parents, her sister, and Vazquez in a Costa Mesa apartment. Vazquez was 11 years older than N.V. and while their relationship had been "peaceful[]" as siblings before the abuse, they were not physically affectionate with each other, hugging only on special occasions like Christmas or New Year's. That changed when N.V. was about 10 years old; Vazquez began to hug her more frequently. He would approach her from behind, wrap his arms around her, touch her breasts, and then move his arms down the front of her body.

The first time Vazquez came up behind her and hugged her in the kitchen, he told her that he loved her, which was unusual for him, as was the hug. N.V. commented to Vazquez that his behavior was "weird." He only placed his hands on N.V.'s waist on this occasion, but escalated his actions in later contacts. At the time, N.V. thought his conduct might be "normal," but she grew to understand it was not appropriate.

Vazquez touched her breasts over her clothing five times, usually when she was in the kitchen or sitting at Vazquez's computer in his room. N.V. would tell Vazquez to stop and threaten to tell their parents. Vazquez told her not to tell them. He would then promise not to do it again.

"Around two times or more," Vazquez reached under N.V.'s shirt and touched her breasts over her bra. Both instances occurred in his room. When N.V. told him to stop, Vazquez did not, instead insisting that N.V. "liked it."

Vazquez also touched N.V.'s vaginal area, sometimes under the pretext of hugging her and sometimes without any pretext. The first time this happened, Vazquez sat next to her in the living room while she was watching television. He placed his hand

on her vagina over her clothes, and then departed for work. On another occasion, when N.V. was standing in the kitchen, Vazquez approached her from behind and put one hand on her breast and the other on her vagina. Vazquez touched her in a similar manner over her clothes while she was playing video games in his room.

N.V. also described times Vazquez used his hand to touch her vagina with skin-to-skin contact, including once after she had showered and was changing in her room. Vazquez entered the room, touched her crotch over her clothing, moved his hand back and forth, and then put his finger in her vagina. Vazquez inserted his fingers into her vagina three different times.

When Vazquez hugged N.V., he sometimes pressed against her, and she felt his penis against her buttocks. Vazquez asked N.V. if she wanted to play a game, and when she responded "Sure," he blindfolded her and put his thumb in her mouth and then his erect penis.

The next time Vazquez "played the game," he surprised N.V. in the bathroom, entering as she was about to leave. He closed the door, sat N.V. on the toilet, and directed her to close her eyes. He inserted his penis in her mouth, and he used his hands to push her head back and forth on his penis. When N.V. tried to resist, Vazquez pushed harder. When their sister arrived home, Vazquez stopped and left the bathroom. He told N.V. not to tell their parents. N.V. was unsure exactly how many other acts of oral copulation occurred.

Vazquez engaged in other sexual conduct with N.V., including grabbing her buttocks when she walked. He approached her once, stating, "Let's do it," referring to sexual intercourse. When N.V. told Vazquez she did not want to, he contradicted her, stating she did. They did not have sex. When N.V. first started her menstrual cycle and Vazquez learned of it, he told her to warn him when she was on her "period" so he would not "do anything" to her.

N.V. was "afraid and embarrassed" to report the abuse, frightened that her "parents would be disappointed in [her]," concerned that it would "ruin" her family, and she felt "a little" like the abuse was her fault. When N.V. was 12, the following school year after the abuse had started, she confided in a school administrator, who then aided a very "upset" N.V. in a tearful call to her mother.

As we discuss below, N.V. underwent a sexual assault examination and placed a recorded "pretext call" to Vazquez in an attempt to have him admit the abuse.

Vazquez did not testify. In an interview with the police, he denied touching N.V. inappropriately. According to Vazquez, he examined her vagina at her request after she had her first period at camp because she did not have anyone to explain menstruation to her. He did not touch her, but instead only told her that what she was experiencing was normal and she should speak to their mother. N.V. testified that when she had her first period at science camp, she turned to the guidance counselor for help and then her mother at home, not Vazquez.

DISCUSSION

We address Vazquez's claims in the order they arose below.

1. *Section 288.5*

Vazquez contends the People were required to prosecute him for a single count of violating section 288.5, continuous sexual abuse of a minor by a person residing with the child, as the more specific statute instead of charging him with eight counts under section 288, subdivision (a), of separate lewd acts with an underage victim. Other courts have rejected many variations of this argument. (*People v. Torres* (2002) 102 Cal.App.4th 1053, 1056-1061 (*Torres*); *People v. Alvarez* (2002) 100 Cal.App.4th 1170, 1177-1178 (*Alvarez*); *People v. Johnson* (1995) 40 Cal.App.4th 24, 26; *People v. Hord* (1993) 15 Cal.App.4th 711, 716-721 (*Hord*); *People v. Wilkerson* (1992) 6 Cal.App.4th 1571, 1581-1582 (*Wilkerson*).)

Commonly referred to as the *Williamson* rule, prosecution under a general criminal statute may be precluded because a more specific prohibition applies. (See *In re Williamson* (1954) 43 Cal.2d 651, 654; *People v. Gilbert* (1969) 1 Cal.3d 475, 479-480.) But *Hord* explained that "sections 288.5 and 288 are not subject to the *Williamson* rule." (*Hord*, *supra*, 15 Cal.App.4th at p. 720) "'The doctrine that a specific statute precludes any prosecution under a general statute is a rule designed to ascertain and carry out legislative intent.' [Citation.] The Legislature's intent in passing section 288.5 was not to enact a specific statute to apply in lieu of a general statute. The intent was to enact a statute for an area which the Legislature believed was not covered by any other law. That this statute's necessity was nullified by the *Jones* decision [*People v. Jones* (1990) 51 Cal.3d 294 (*Jones*)] does not transform this statute into a specific statute under the *Williamson* rule since this was clearly not the Legislature's intent at the time of the enactment." (*Hord*, at p. 720, fn. omitted.)

Hord explained that the Legislature enacted section 288.5 in response to *People v. Van Hoek* (1988) 200 Cal.App.3d 811 (*Van Hoek*), in which the Court of Appeal reversed seven counts of molestation by a father against his daughter on grounds her "generic and amorphous testimony" did not support the charges against him because it impaired his ability to present a defense. (*Van Hoek*, at pp. 814, 818.) Disapproving *Van Hoek* and its progeny, *Jones* held that "generic testimony" may constitute substantial evidence of sexual offenses (51 Cal.3d at pp. 313-316) and that such "generic testimony [does not] deprive[] the defendant of a due process right to defend against the charges against him." (*Id.* at pp. 320-321.)

Every court that has considered the issue has reached the same conclusion as *Hord*. So do we. In *Wilkerson*, for example, the court explained, "Section 288.5 provides a vehicle for prosecuting resident child molesters if specific acts of sexual abuse at a particular time cannot be proven. [Citation.] It is not, nor was it intended to be, a limit on prosecutorial discretion in determining how a particular defendant is to be

charged." (*Wilkerson, supra,* 6 Cal App.4th at p. 1581.) Similarly, *People v. Johnson* added that the People "are not required to prosecute under section 288.5 in order to gain a conviction against a resident child molester even when the evidence is based on 'generic testimony,'" provided the generic testimony meets the requirements established in *Jones*. (*People v. Johnson, supra,* 40 Cal.App.4th at p. 26.)

Vazquez's reliance on *People v. Johnson* (2002) 28 Cal.4th 240, 245 (*Johnson*) is misplaced. In that case, the Supreme Court held that a defendant may not be convicted of violating both sections 288.5 and individual child sex offenses committed during the same period. Accordingly, consistent with *Johnson*, the appellate court in *Torres* concluded that where the defendant's sentence under section 288.5 was 6 years, compared to 21 years on individual counts, "the appropriate remedy is to reverse the conviction for violating section 288.5." (*Torres, supra,* 102 Cal.App.4th at p. 1060.)

Observing that section 288.5's purpose was to provide additional protection for children, *Torres* held the statute did not preclude prosecutors from charging a defendant with individual child sex crimes in the alternative. (*Torres, supra,* 102 Cal.App.4th at p. 1059.) While *Johnson* did not directly address the defendant's "specific over general" argument, *Torres* expressly rejected it. (*Torres*, at p. 1058.) *Torres* explained that section 288.5's requirement that offenses under that statute must be charged in the alternative to individual sex crimes "gives the prosecutor maximum flexibility to allege and prove *not only* a continuous sexual abuse count, but also specific felony offenses commensurate with the defendant's culpability, subject only to the limitation that the defendant may not be *convicted* of both continuous sexual abuse and specific felony sex offenses committed in the same period." (*Torres*, at p. 1059.) Thus, in a decision predating *Torres*, the court in *Alvarez*, left the defendant's convictions for multiple child sex offenses intact while vacating his conviction under section 288.5. (*Alvarez, supra,* 100 Cal.App.4th at pp. 1177-1178.)

Conversely, the court in *People v. Bautista* (2005) 129 Cal.App.4th 1431, 1437-1438, affirmed the defendant's conviction under section 288.5 while vacating those for individual sex abuse counts because the longer sentence under the former was "more commensurate with [his] culpability" and "proportionate to the egregious criminal conduct in which [he] engaged." (Accord, Jud. Council of Cal. Criminal Jury Inst. (2017) Bench Note to CALCRIM No. 1120, p. 843 ["If a defendant is erroneously convicted of both continuous sexual abuse and specific sexual offenses and a greater aggregate sentence is imposed for the specific offenses, the appropriate remedy is to reverse the conviction for continuous sexual abuse"].)

Johnson provides *no* support for Vazquez's claim that the prosecutor could only proceed under section 288.5. The high court in *Johnson* specifically stated its conclusion that dual convictions could not stand was not "inconsistent with . . . *Hord*[, *supra*,] 15 Cal.App.4th 711, 720, where the Court of Appeal concluded that the Legislature's purpose in passing section 288.5 was not to enact a specific statute in order to preclude prosecution for other generally applicable sexual offenses." (*Johnson*, *supra*, 28 Cal.4th at p. 246, fn. 5.) We therefore find no merit in Vazquez's contention the prosecutor was required to charge him with continuous sexual abuse of a minor rather than prosecuting him for discrete child sex offenses.

2. *Generic Testimony*

Although Vazquez recognizes *Jones*, *supra*, 51 Cal.3d 294 rejected the identical constitutional challenge he makes that so-called "generic" victim testimony is insufficient to support child sex offense convictions because it prevents the defendant from mounting a defense, he raises the issue to preserve his claim that the Supreme Court should revisit the issue and adopt Justice Mosk's dissent in *Jones*. Vazquez recognizes the *Jones* majority opinion is binding precedent (*Auto Equity Sales, Inc. v. Superior*

Court (1962) 57 Cal.2d 450, 455), and we therefore do not address his general contention further. It is preserved.

Vazquez also challenges the sufficiency of the evidence even under *Jones* to support six of the eight molestation counts (§ 288, subd. (a)). Specifically, he argues that apart from the evidence supporting two counts based on oral copulation, "[t]he remaining six convictions are based on [such] non-descript testimony of touching . . . [and] two or three incidents of digital penetration" that "those six counts should be dismissed due to legally insufficient evidence." We disagree.

As *Jones* explained, "[E]ven generic testimony (e.g., an act of intercourse 'once a month for three years') outlines a series of *specific*, albeit undifferentiated, incidents, *each* of which amounts to a separate offense, and *each* of which could support a separate criminal sanction." (*Jones*, *supra*, 51 Cal.3d at p. 314, original italics.) *Jones* held that the victim's testimony will support a conviction for child sex offenses under section 288 where he or she describes (1) "*the kind of act or acts committed* with sufficient specificity . . . (e.g., lewd conduct, intercourse, oral copulation or sodomy)"; (2) "the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information . . . (e.g., 'twice a month' or 'every time we went camping')"; and (3) "*the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade' . . .)." (*Jones*, at p. 316, original italics.) Additional details may assist the trier of fact, but are not essential to sustain a conviction. (*Ibid.*)

Vazquez concedes N.V.'s testimony "established both the nature of the acts, and the general time period in which they occurred," but, quoting *Jones*, he contends she did not "'describe the number of acts committed with sufficient certainty' to support six counts of conviction beyond the two counts based on oral copulation." He suggests N.V. "was essentially guessing" in testifying that Vazquez touched her breasts over her clothes five times and usually in the kitchen or at Vazquez's computer in his room, "two or more" times under her shirt but over her bra at his computer, and that he inserted his

finger in her vagina two or three times, including once when he entered her room after she showered.

Vazquez seeks to reduce his liability to just one instance of each type of contested lewd contact (over her shirt, under her shirt, and digital penetration), plus the two counts he concedes could be sustained based on oral copulation, for a total of five counts under section 288, subdivision (a), instead of eight counts as the prosecutor charged against him. In other words, apart from two lewd act convictions that Vazquez attributes to N.V.'s testimony about oral copulation, Vazquez argues the jury could only reasonably convict him of three more counts of lewd contact rather than the seven or eight instances N.V. testified to regarding Vazquez touching her breasts over and under her shirt and digitally penetrating her. Vazquez's challenge has no merit.

N.V. identified specific instances when her brother molested her and she did not hesitate to specify the number of times he committed each type of abuse, unlike in the out-of-state authority Vazquez cites where the victim was not "absolutely sure" about her generic claim of ten or more bad touches. (*LaPierre v. State* (Nev. S.Ct. 1992) 108 Nev. 528, 530-531.) It was for the jury and the jury alone—not Vazquez or a reviewing court on appeal—to evaluate N.V.'s credibility. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.) Consequently, Vazquez bears "an enormous burden" in challenging the sufficiency of the evidence on appeal. (*Ibid.*)

He fails to meet that burden because, just as in *Jones*, where the high court found the victim's description of regular abuse, including "*four to six*" incidents of oral copulation on camping trips and "*eight or ten . . . in the bathroom or shower,*" adequate to support the six counts of lewd acts that the jury found true in its verdict (*Jones*, *supra*, 51 Cal.3d at pp. 302-303, 322-323), it was this jury's sole prerogative to determine whether Vazquez committed the number of incidents charged based on N.V.'s testimony. As the Supreme Court explained in *Jones*, "the particular details surrounding a child molestation charge are not elements of the offense and are unnecessary to sustain a

conviction." (*Id.* at p. 315.) There is no basis to overturn the jury's determination of the number of sustained counts.

3. *Pretext Call*

Vazquez argues the admissions or tacit admissions he made in the pretext call should have been excluded as involuntary statements because they were coerced by N.V., who was acting at that time as an agent of law enforcement. He asserts that because his lawyer did not object to the admissibility of the call, he received constitutionally ineffective assistance of counsel (IAC). In the call (which turned into four calls when Vazquez hung up because he was busy with customers at work and called N.V. back three times), N.V. pretended she suffered from pain during urination, which she attributed to Vazquez touching her vagina. Although he initially denied N.V.'s accusations and accused her of "playing a game obviously," Vazquez did admit in the second call, "I haven't touched you in like awhile," before adding, "It was an accident okay." N.V. replied, "You're saying that's an accident when you've been doing it several times" and "How is, like, your penis in my mouth an accident?" Vazquez responded by stating he was going to call their father before again directing N.V. to give the phone to their mother.

Vazquez claims the tactics N.V. employed in the call amounted to psychological coercion that overcame his ability to remain silent or deny the accusations. Those tactics consisted of: (1) N.V. calling him at work, where he "had to measure his response to avoid embarrassment or worse in his workplace," (2) N.V. denying him the option not to speak since he could not refuse a family member—particularly a younger sister—coming to him for help with an intimate medical problem, and (3) N.V. alternating between threats to reveal the abuse to their mother—with the accompanying "emotional and familial consequences"—and making "health-related appeals" that

"suggest[ed] . . . his admission to inappropriate sexual contact was necessary to a proper diagnosis of her condition."

N.V. made the pretext calls from an interview room at the police station, which were monitored on speaker phone by a female detective who suggested the calls, provided N.V. with proposed questions and answers, discussed ways to respond to potential responses by Vazquez, and communicated with N.V. during the calls by writing notes to her.

"It long has been held that the due process clause of the Fourteenth Amendment to the United States Constitution makes inadmissible any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion." (*People v. Neal* (2003) 31 Cal.4th 63, 79.) "'The test for determining whether a confession is voluntary is whether the defendant's "will was overborne at the time he [or she] confessed." [Citation.] "'The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were "such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." [Citation.]' [Citation.] In determining whether or not an accused's will was overborne, 'an examination must be made of "all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." [Citation.]' [Citation.]" [Citation.]' [Citation.]" (*People v. McWhorter* (2009) 47 Cal.4th 318, 346-347.) Because of the constitutional interests at stake, we independently review whether a defendant's admissions were voluntary (*People v. Dykes* (2009) 46 Cal.4th 731, 752), including when the defendant did not object below. (*People v. Haydel* (1974) 12 Cal.3d 190, 198.)

The fact that Vazquez called N.V. back before he admitted to the contact he claimed was "accidental" and, indeed, called her back twice more, undercuts his claim that his statements were involuntary. There is no coercion requiring "exclu[sion] from evidence statements made by a suspect who voluntarily contacts the crime victim who,

unknown to the suspect, is acting as a police agent." (*People v. Guilmette* (1991) 1 Cal.App.4th 1534, 1541-1542.) Nothing indicated Vazquez knew N.V. was calling from the police station or that he believed she was calling at an officer's behest or with a detective's assistance.

Even assuming N.V. was acting as an agent of the police, we do not find the techniques employed during the call to be so psychologically coercive as to render Vazquez's statements involuntary. In particular, while Vazquez claims he felt restrained in responding at work because someone might overhear, that did not prevent him from denying N.V.'s initial accusations. He also demonstrated his ability to terminate the call multiple times, and to call N.V. back from work at times of his own choosing when he was more able to talk freely. Similarly, the notion that he had no option but to speak to N.V. because she was a younger family member with a medical condition is belied by the record. The record shows Vazquez had no trouble rebuffing N.V.'s entreaties to speak with her as he demanded that she hand the phone to their mother.

The overwhelming psychological duress Vazquez claims in N.V.'s alleged threats to reveal the abuse to a higher authority—their mother—does not constitute invalid official coercion. "'"The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable."'" (*People v. Williams* (2010) 49 Cal.4th 405, 443.)

Viewed as a whole, Vazquez's return calls and his repeated insistence he would speak to both their parents, together with his resistance to speaking with N.V., demonstrated, "'far from . . . a will overborne by official coercion, [it] suggests instead a still operative ability to calculate his self-interest in choosing whether to disclose or withhold information.'" (*People v. Williams, supra*, 49 Cal.4th at p. 444.)

Because N.V.'s pretext call did not violate Vazquez's right to due process, his IAC claim also fails. Counsel is not required to make a futile motion or otherwise

indulge in idle acts. (*People v. Reynolds* (2010) 181 Cal.App.4th 1402, 1409.) Defense counsel does not provide constitutionally deficient assistance by declining to lodge a futile objection. (*People v. Anderson* (2001) 25 Cal.4th 543, 587.)

4. *Nurse's Testimony*

Vazquez contends the trial court erred when it overruled his objection to a certified sexual assault examiner's testimony as speculative and lacking foundation. Specifically, when the prosecutor asked the examiner, Jennifer Rivera, if she had an opinion "[r]egarding the injuries that you observed in this case, and [based on] your training, background, and knowledge . . . how those injuries would occur," defense counsel objected, the court overruled the objection, and Rivera answered that they were "very suspicious of sexual abuse." Rivera earlier had testified that during an examination after N.V. reported the abuse, Rivera found a tear in N.V.'s hymen and a "shallow cleft," both of which appeared to be healed injuries. The latter was older, but the former "a little bit deeper," splitting the hymen. Rivera explained the injuries were "consistent" with the history the victim gave, could "be done by a penis, a finger, or an object," and that different factors affect "whether a penetrating object causes injury," including that "you have to have some force used in order to create those types of injuries" and further that "lubrication or lack thereof," the victim's hydration and "nutritional status," and whether the victim "is . . . a moving target, is she struggling, is she squirming, is she trying to get away" are also factors.

Vazquez asserts that Rivera's testimony that N.V.'s injuries "were highly suspicious of sexual abuse *went beyond* her expertise in identifying and cataloging *potential* sexual assault injuries." (Italics added.) Vazquez suggests Rivera was unqualified to provide "an evaluation of the cause of injuries." The challenge is misplaced. ""'[T]he question of the degree of [an expert's] knowledge goes more to the weight of the evidence than its admissibility.'"" (*People v. Eubanks* (2011) 53 Cal.4th

110, 140.) Moreover, Vazquez did not object based on Rivera's lack of qualifications, which would have given the prosecutor the opportunity to further elicit Rivera's experience and training. His belated challenge is therefore forfeited. (*People v. Dowl* (2013) 57 Cal.4th 1079, 1087-1088.)

In any event, Rivera was well-qualified to give her opinion. She received the requisite instruction at the California Clinical Forensic Medical Training Center (the Center) in Sacramento to gain certification as a Sexual Assault Response Team (SART) nurse, complemented by a further two months of clinical training with her employer, Forensic Nurse Specialists, and six years of experience as a SART examiner, with monthly additional training. Of particular note, her instruction at the Center focused on anogenital injury, and her testimony reflected that she was well-versed in the subject.

In directing that the Center be established, the Legislature "recognize[ed] that adequate training of medical professionals was essential both to provide for the medical needs of victims of domestic violence, child abuse, elder abuse and sexual assault 'and to provide comprehensive, competent *evidentiary examinations for use by law enforcement agencies*.' (Stats. 1995, ch. 860, § 1, p. 6541, italics added.)" (*People v. Uribe* (2008) 162 Cal.App.4th 1457, 1477, fns. omitted.) With certification, medical personnel—including nurses—are authorized not only to perform and document sexual assault examinations, including collecting and preserving evidence, but also to "interpret" their findings. (§ 13823.93, subd. (a)(2).) Vazquez's observation that Rivera was "not a medical doctor" is therefore irrelevant. And in light of this express legislation, Vazquez's challenge fails in arguing by analogy to precedent in other jurisdictions holding that a biomechanical engineer is not authorized to provide a medical opinion.

Vazquez also argues that in stating that N.V.'s injuries were "very suspicious of sexual abuse," Rivera invaded the jury's province to determine his guilt or innocence. Not so. She did not discuss or give an opinion on whether the elements of any sex crime were satisfied, nor did she state a particular crime had been committed or

that N.V. was a credible witness. (Compare *People v. Torres* (1995) 33 Cal.App.4th 37, 44; *People v. Sergill* (1982) 138 Cal.App.3d 34, 39.) In sum, the trial court did not err in admitting Rivera's testimony or overruling Vazquez's objection.

5. *Acquittal-First Rul*e

As Vazquez correctly argues, the prosecutor briefly misstated California's version of the acquittal-first rule, but then corrected herself and, as Vazquez acknowledges, the trial court accurately instructed the jury on the rule. The prosecutor's initial error therefore does not require reversal.

Attempting to explain to the jury why the instructions would address attempted lewd acts when the charges against Vazquez consisted of eight allegedly completed lewd acts, the prosecutor stated, "Well, it's basically called a lesser included offense." She strayed into error when she added, "It's—*in order to even consider* an attempted lewd act you have to find the defendant not guilty of the charged offense to convict of the lesser offense." (Italics added.) Some jurisdictions follow this rule (see, e.g., *People v. Kurtzman* (1988) 46 Cal.3d 322, 330, fn. 7 [citing examples]), but California and other states have adopted the so-called modified acquittal-first rule under which jurors may consider and deliberate on greater and lesser included offenses in any order. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1110 (*Bacon*); *Kurtzman*, at pp. 328, 335).[1]

One court has explained that the rationale behind the modified rule is to provide jurors with "options that enable the fact finder to better gauge the fit between the state's proof and the offenses," mitigating "risks [of] false unanimity and coerced

[1] It remains true that jurors must *return* a verdict on a greater offense when, or before, returning verdicts on lesser included offenses. (*Bacon*, *supra*, 50 Cal.4th at p. 1110.) A trial court's failure to adhere to this procedure, which is not at issue here, is a mistake of law barring retrial on the greater offense if the jury has deadlocked on it. (*People v. Fields* (1996) 13 Cal.4th 289, 311.)

verdicts." (*State v. LeBlanc* (S.Ct. AZ 1996) 924 P.2d 441, 442-443 [186 Ariz. 437].) Consequently, "a trial court should not tell the jury it must first unanimously acquit the defendant of the greater offense before deliberating on or even considering a lesser offense." (*People v. Dennis* (1998) 17 Cal.4th 468, 536.)

Here, after the prosecutor's misstatement, defense counsel objected and while the trial court initially overruled the objection, the court subsequently correctly instructed the jury with CALCRIM No. 3518. That instruction provides: "It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime." Additionally, when defense counsel objected, the prosecutor immediately corrected herself in response, stating, "Now, again, you get to decide how you want to deliberate about it, you can deliberate about the lessers or greaters in whatever order you want . . . ." She also correctly added that "at the end of the day, if you're going to find Mr. Vazquez guilty of the lesser included offense you have to find him not guilty of the greater offense. And you're going to get the instruction that explains that to you."

"[I]t is improper [for the prosecutor] to misstate the law [generally]" (*People v. Bell* (1989) 49 Cal.3d 502, 538), but automatic reversal does not follow from every misstep, but instead only where a miscarriage of justice occurs. (Cal. Const., art. VI, § 13). Here, the initial error was corrected immediately by the prosecutor herself and subsequently by the trial court in its instructions. While, as a general rule, a prosecutor's misstatement of the law constitutes misconduct (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 36), not every error is of equal magnitude.

Whether considered under the label of misconduct or prosecutorial error, the applicable federal and state standards are well established. "'"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the

conviction a denial of due process.’”””” (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).) Nothing the prosecutor did rises to this level; there was no pattern at all in a single misstatement that the prosecutor herself corrected.

Vazquez argues the error was prejudicial because the trial court failed to overrule defense counsel’s objection, which he interprets as lending support to the prosecutor’s initial misstatement. Additionally, he observes that some misconduct cannot be corrected effectively because ‘“‘“You can’t unring a bell.”’” (*Hill*, *supra*, 17 Cal.4th at p. 845.) This error does not fall into that rare, “exceptional” category. (*People v. Allen* (1978) 77 Cal.App.3d 924, 935; compare, e.g., *People v. Carrillo* (2004) 119 Cal.App.4th 94, 103, fn. 3 [asking “only one question about . . . membership in Al Qaeda . . . would be hard to defend as ‘relatively brief’”]; *People v. Wagner* (1975) 13 Cal.3d 612, 621 [unfounded insinuations of defendant’s involvement in drug dealing]; *People v. Brophy* (1954) 122 Cal.App.2d 638, 652 [incurable “electric effect” when prosecutor produced in closing argument a missing bullet never admitted in evidence].)

“‘No trials are perfect—evidentiary or procedural errors are bound to occur.’” (*People v. Wilson* (2008) 44 Cal.4th 758, 840.) Here Vazquez identifies no error other than the one the prosecutor and the court mended, affording him a nearly perfect trial. In particular, we presume the jurors abided by the court’s direction in giving CALCRIM No. 3518, “treat[ing] the court’s instructions as a statement of the law by a judge, and the prosecutor’s comments as words spoken by an advocate in an attempt to persuade.” (*People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8.) Vazquez’s bid for reversal therefore fails.

6. *CALCRIM No. 1110*

Vazquez asserts a pattern jury instruction given in this case, CALCRIM No. 1110, is argumentative, biased in favor of the prosecution, duplicative, and affected the weight of the evidence by focusing on what the prosecutor need not prove.

Argumentative instructions "'invite[s] the jury to draw inferences favorable to [one party over the other], and therefore properly belong[] . . . in the arguments of counsel to the jury,'" not in the instructions. (*People v. Flores* (2007) 157 Cal.App.4th 216, 220.) The trial court must not become an advocate in the guise of instructing the jury. (*Quercia v. United States* (1933) 289 U.S. 466, 470.) There was no such risk here.

CALCRIM No. 1110 is the standard instruction for a charge of lewd or lascivious conduct with a child under 14 years of age (§ 288, subd. (a)). The instruction here specified Vasquez faced charges in "Counts 1-8 [of] committing a lewd or lascivious act on a child." The court did not modify CALCRIM No. 1110's substantive terms, which provide that the People must prove the defendant "willfully touched any part of a child's body either on the bare skin or through the clothing," the child was less than 14 years old, and the defendant "committed the act *with the intent of* arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child." (CALCRIM No. 1110, italics added.) The instruction further specifies that a child's consent "is not a defense" and that to commit an act "willfully" is to do it "willingly or on purpose." (*Ibid*.) A third standard clarification in the instruction draws Vazquez's challenge here; it states: "*Actually* arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or the child is not required." (*Ibid.*, italics added.)

The instruction accurately states the law. Actual sexual arousal is not an element of the offense. "Whether the acts actually, or in point of fact, have the effect of arousing the passions or sexual desires . . . is immaterial." (*People v. McCurdy* (1923) 60 Cal.App. 499, 502; see also 2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 53, p. 453 ["whether passions are actually aroused or gratified is of no consequence except as it may support the inference of intent"].)

With the focus of the offense on the intent of the perpetrator, "the courts have long indicated that section 288 prohibits *all* forms of sexually motivated contact

with an underage child. Indeed, the 'gist' of the offense has always been the defendant's intent to sexually exploit a child, not the nature of the offending act. [Citation.] '[T]he purpose of the perpetrator in touching the child is the controlling factor and each case is to be examined in the light of the intent with which the act was done . . . . If [the] intent of the act, *although it may have the outward appearance of innocence*, is to arouse . . . the lust, the passion or the sexual desire of the perpetrator [or the child,] it stands condemned by the statute . . . .'" (*People v. Martinez* (1995) 11 Cal.4th 434, 444.)

Vazquez argues that because the required intent is specified earlier in the instruction, CALCRIM No. 1110's subsequent reference to arousal as *not* being necessary adds nothing to the instruction and therefore is, at best, confusing or repetitive. He also claims the reference to actual arousal distracts the jury from the elements by identifying a "negative obligation" for the prosecutor, thereby fostering a "tone . . . suggest[ing] that the prosecution's burden is considerably lower than it actually is in a lewd act case . . . ." We disagree.

The tone of the instruction is neutral. The phrase "lewd or lascivious act" in the governing statute and at the outset of the instruction could be construed to require inherently sexual touching, such as contact with the genitals or touching in an openly lewd or sexual manner. Because such touching may be a precursor or lead to arousal—but actual arousal is not required (*People v. Cordray* (1963) 221 Cal.App.2d 589, 593)—CALCRIM No. 1110 properly clarifies the law. The instruction therefore fulfills the court's duty to instruct the jury on the governing legal precepts. (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1331.)

The fact that CALCRIM No. 1110 employs a negative formulation to aid in conveying the requisite intent does not invalidate it. Vazquez cites no authority in law or reason for that proposition, and his objection is contrary to established practice. (See, e.g., CALCRIM No. 3400 [defendant asserting alibi defense need not prove his or her whereabouts at time of offense to cast reasonable doubt on charges].) And while arousal

is not *required* to prove intent, nothing in the instruction forbids the jury from considering lack of actual sexual arousal as circumstantial evidence of a lack of culpable intent. It did not reduce the prosecutor's burden. CALCRIM No. 1110, in combination with the reasonable doubt instruction (CALCRIM No. 220), correctly told the jury the People had to prove beyond a reasonable doubt that Vazquez acted with the intent of "arousing, appealing to, or gratifying the lust, passions, or sexual desires of [himself] or the child." We presume jurors are "able to understand and correlate instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Consequently, there is no merit to Vazquez's challenge.

7. *CALCRIM Nos. 362 and 371*

Vazquez contends the trial court's consciousness of guilt instructions in CALCRIM Nos. 362 (false statements) and 371 (hiding or suppressing evidence) violate due process because they allowed the jury to draw irrational inferences of guilt.[2] These instructions permit the jury to infer from a defendant's knowingly false or misleading statements related to a crime, or from attempts to conceal evidence pertaining to the crime, that the defendant is aware he or she is guilty of the offense. The instructions do not *require* the inference. A permissive inference "leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof." (*County Court of Ulster Cty. v. Allen* (1979) 442 U.S. 140, 157.) Consequently, "[i]nstruction on an entirely permissive inference is invalid as a matter of due process only if there is no rational way the jury could draw the permitted inference." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1243-1244 (*Pensinger*).)

A defendant's alleged consciousness of guilt is well-established as a relevant consideration for the jury. Deliberately false material statements by a defendant "have long been considered cogent evidence of a consciousness of guilt, for they suggest there is no honest explanation for incriminating circumstances. [Citation.] Moreover, permitting the jury to draw an inference of wrongdoing from a false statement is as much a traditional feature of the adversarial fact finding process as impeachment by prior

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[2] As provided to the jury, CALCRIM No. 362 stated: "If the defendant made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself." As provided to the jury, CALCRIM No. 371 stated: "If the defendant tried to hide evidence against him, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself."

inconsistent statements." (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1168.) Indeed, "[t]he inference of consciousness of guilt from willful falsehood . . . is one supported by common sense, which many jurors are likely to indulge even without an instruction." (*People v. Holloway* (2004) 33 Cal.4th 96, 142 (*Holloway*).) "The conclusion suggested by [an] instruction [on consciousness of guilt, i.e., that] the defendant himself believed he was responsible for the crime—is altogether justified on proof of the predicate fact—the defendant lied about the crime." (*People v. Ashmus* (1991) 54 Cal.3d 932, 977, overruled on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

Vasquez complains that an inference of criminal responsibility is not a foregone conclusion from a lie or concealment of evidence. He asserts, "The inference of guilt is unreasonable because it is not more likely than not that one who tries to hide incriminating evidence or who makes a false statement is guilty of the charged offense." He suggests that "[a] person who is a suspect in a crime, even if innocent, has a motivation to exculpate himself, even by means of evidence suppression or lying." Thus, he claims the "more logical inference is merely fear of prosecution or conviction."

Vasquez's challenge is misplaced because the consciousness of guilt instructions provide equally for these possibilities. They caution the jury that a lie or attempt at concealment merely "*may* show" a consciousness of guilt and that the jury "may" consider or reject the lie or concealment as probative because "it is up to you to decide its meaning and importance." (CALCRIM Nos. 362, 371, italics added.) The instructions also provide that evidence of a deliberate lie or attempt to conceal evidence "cannot prove guilt by itself." (*Ibid.*) The instructions must be read as a whole and CALCRIM No. 224 instructs the jury that where two or more reasonable conclusions may be drawn from circumstantial evidence, they must accept the one pointing to the defendant's innocence. In any event, because an inference of a consciousness of guilt

from a material lie or concealment of evidence is not illogical, Vasquez's due process challenge fails. (*Pensinger*, *supra*, 52 Cal.3d at pp. 1243-1244.)

Vasquez acknowledges our Supreme Court has repeatedly approved consciousness of guilt instructions. (E.g., *People v. Howard* (2008) 42 Cal.4th 1000, 1024-1025 [CALJIC No. 2.03 (false statements)]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 101-102 [CALJIC Nos. 2.04 (fabricating evidence) & 2.06 (suppressing evidence)]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1224 [CALJIC No. 2.06].)

He contends, however, that unlike their CALJIC counterparts, the CALCRIM instructions here used the phrase "aware of his guilt" instead of consciousness of guilt. As Vazquez phrases it, "The term 'aware of his guilt' is more specific and connotes an actual internal recognition that one is guilty of a crime. As such, CALCRIM Nos. 362 and 372 go beyond merely permitting an inference of a consciousness of guilt from false statements and flight [to] allow for an actual inference of guilt itself. In this respect, the instructions violate due process."

We are not persuaded by the distinction. As the Fifth District explained in *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, an "etymological analysis" based on dictionary definitions of the words "'aware'" and "'[c]onscious'" demonstrates the words are not so dissimilar in meaning to raise a due process claim. Instead, both properly "allow[] a jury to infer from a flight instruction . . . 'guilt consciousness' (in the syntax of the dictionary) or 'consciousness of guilt' (in the syntax of the California Supreme Court)." (*Id.* at pp. 1158-1159.) As the appellate court explained, because "the inference [of a consciousness of guilt examined in Supreme Court precedent] passes constitutional muster, so does the inference here." (*Ibid.*; accord, *People v. Price* (2017) 8 Cal.App.5th 409; *People v. Paysinger* (2009) 174 Cal.App.4th 26, 29-32.) We therefore join those courts in upholding the awareness of guilt instructions.

DISPOSITION

The judgment is affirmed.

GOETHALS, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.